IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1521

GERALD MARKER, ET AL.,
Petitioners (Intervenors),

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL.,
Respondents (Plaintiffs),

and

NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC., ET AL.,
Respondents (Defendants).

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR PLAINTIFF UNION RESPONDENTS

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COUNTER-STATEMENT OF ISSUES

This is a suit by plaintiff union respondents to prevent defendant Right to Work groups from using employer funds to finance suits by union members against their unions. Petitioners-intervenors (hereinafter intervenors) are individuals suing plaintiff unions in various federal and state courts with funds and other assistance supplied by defendant Right to Work groups and they sought intervention in this case represented by counsel financed by those Right to Work defendants. The District Court denied intervenors' motion for intervention as of right on the ground that they were adequately represented by the defendant Right to Work groups and limited their permissive intervention to the question whether the plaintiffs in the law suits financed by the Right to Work groups are "union-member employees." Intervenors appealed, the Court of Appeals summarily affirmed and this Court denied certiorari. After cross-appeals from the District Court's decision on the merits, the Court of Appeals struck intervenors' brief after plaintiff unions pointed out that it went beyond the limited intervention accorded intervenors. Thus the issue presented is:

> Whether the Court below properly restricted intervenors' brief to the issue specified by the District Court in granting limited intervention.

COUNTER-STATEMENT OF THE CASE

On May 1, 1973, a number of labor unions and their affiliates (respondents-plaintiffs, hereinafter plaintiffs) filed this suit against the National Right to Work Committee and the National Right to Work Foundation, two employer-financed groups dedicated to attacking union organization and union security. Plaintiff unions' complaint asserted that these two defendant Right to Work groups are using employer money to encourage and

finance suits by dissident employees and union members against plaintiff unions, in violation of the second proviso to Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(4) (1970). That proviso bars "interested employers" from "directly or indirectly" financing or encouraging suits by union members against their unions. Plaintiffs seek an injunction and other relief against the continued instigation and financing by interested employers, through the defendant Right to Work Committee and Foundation, of such suits by union members against their unions.[1]

Upon the filing of this suit, defendants immediately moved to dismiss the complaint on a variety of grounds, including objections to the jurisdiction of the Court and a claim that the "interested employer" ban of the law applies only to the immediate employer of the employee who is suing his union. On October 24, 1973, defendants' motion to dismiss was rejected by the District Court, 366 F. Supp. 46 (D.D.C. 1974), and discovery commenced immediately thereafter. On January 18, 1974, plaintiffs moved in the District Court for an order requiring defendants to reveal, under conditions of litigation confidence, the names of some 190 of the largest contributors among the more than 8000 employer contributors to the Right to Work Foundation, and on June 5, 1974, the District Court directed defendants to furnish the names sought. Three separate efforts by de-

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[1] Intervenors' statement (Pet. p. 6) that the complaint "sought to prevent the [Right to Work] Foundation from continuing legal aid to Petitioners, among others, in actions against unions . . ." is a distortion. Respondent-plaintiffs seek only to prevent the Foundation from illegally using funds from interested employers to assist suits against unions. Far from wanting to cut off properly-financed suits by union dissidents against their unions, counsel for plaintiffs affirmatively support such actions. See, e.g., *Trbovich* v. *United Mine Workers*, 404 U.S. 528 (1972); *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975).

fendants to obtain a review of that order in this Court were rebuffed.[2] Defendants still refused to comply with the District Court's discovery order and on January 26, 1976, that Court entered a Rule 37 order finding that "interested employers" are contributing to the Foundation's financing of suits by union members against their unions (App. 6a-7a).[3] Having entered its Rule 37 order on the contributions of "interested employers," the District Court, on its own initiative, included in this same January 26th order a show cause order why summary judgment should not be entered for plaintiffs (*id.* at 8a).

At this juncture of the case, in January of 1976, *more than two-and-a-half years after this suit was commenced*, Gerald Marker and 15 other persons filed a motion in the District Court to intervene as additional defendants. These intervenors (petitioners here) are the very plaintiffs suing their unions in actions supported by the defendant Committee and Foundation with "interested employer" contributions. The collusive character of the intervention attempt was further evidenced when the Right to Work defendants admitted that they are "fi-

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[2] On June 27, 1974 defendants filed in the Court of Appeals an appeal and a petition for writ of mandamus to review the District Court's June 5, 1974 discovery order. On June 28, 1974 the Court of Appeals issued an order dismissing the appeal and this Court denied review thereof on January 20, 1975. 419 U.S. 1132. On March 17, 1975 the Court of Appeals issued its opinion dismissing the petition for writ of mandamus, and on April 14, 1975 this Court unanimously (Mr. Justice Douglas not participating) denied petitioners a stay. 421 U.S. 902. On June 16, 1975 this Court denied certiorari from the Court of Appeals' dismissal of the petition for writ of mandamus. 422 U.S. 1008. These impositions on the time of this Court were later conceded to be unwarranted by counsel for defendants (D.D.C. Tr. Oct. 9, 1975, at 7-8).

[3] "App." references are to the appendix in this Court on the earlier petition for certiorari, 76-1289 and "J.A." references are to the appendix in the Court below on the pending appeals on the merits. "I.A." references are to intervenors' appendix filed in this Court with the pending petition for certiorari.

nancing the intervention",[4] that "the fees and expenses of counsel for the employee-intervenors will be paid by the Foundation," [5] and that Godfrey P. Schmidt, counsel for intervenors, has been for many years a significant member of the team of lawyers working with defendants.[6]

On March 8, 1976, the District Court denied intervention of right on the ground that "movants are adequately represented" (I.A. 51a-52a), but granted permissive intervention "on the limited issue of whether the plaintiffs in the lawsuits" financed by the Foundation are "union-member employees" (I.A. 51a-52a). On April 28, 1976, the District Court struck intervenors' answer as "outside the scope of the permissive intervention granted . . ." (App. 5a). On appeal plaintiffs argued that, since intervenors' interests were adequately represented by defendant Right to Work Foundation, and their intervention

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[4] Defendants' Response to the Motion and Request for Hearing, February 25, 1976, at 1.

[5] *Id.*

[6] Reed Larson, chief executive of both defendants, testified in deposition on February 9, 1976, that Schmidt is one of "a half dozen" or "maybe a dozen" outside counsel who handle most of defendants' cases; "[a]s outside counsel, he is one of the more active ones" (J.A. IX 1130-31). Mr. Schmidt himself asserts that he has given defendants advice and counsel over the years (Appendix in the Court below on the earlier appeal, 76-1346, at 155-56). As Mr. Rex Reed, chief house counsel for defendant Foundation admitted on deposition, this advice and counsel extended to the instant motion to intervene, on which Messrs. Schmidt and Reed consulted "prior to the time that the intervention was filed" (*id.* at 314). It is noteworthy, too, that Mr. Schmidt conceded that "since 1973, he has been one of several local counsel and consultants retained by Defendant Foundation to consult to it" (*id.* at 155) and that, as such consultant, he prepared "a lengthy complaint and an extensive brief" concerning the agency shop clause and "participated in the ensuing intra-Foundation discussion and debate for several months" (*id.* at 156). Equally significant, Mr. Schmidt obtained the names of intervenors and their local counsel in their Foundation-financed suits from defendant Foundation and solicited their intervention in that manner (*id.* at 158).

was collusive and untimely, the District Court was more than generous to intervenors in granting them even the limited permissive intervention provided in the District Court's order. On December 17, 1976, the Court of Appeals affirmed both District Court actions in a summary order (I.A. 49a-50a). On May 16, 1977, this Court denied certiorari. 97 S.Ct. 2177.

On June 2, 1977 the District Court issued its decision on the merits (I.A. 21a-37a). The Court found a violation of the statute in that a majority of the funds of the defendant Right to Work groups come from the contributions of employers with a concrete interest in the law suits financed by defendants (I.A. 29a-30a), but the Court nevertheless dismissed the complaint on the ground that the statutory prohibition on interested employer funding of legal proceedings by union members against their union violates First Amendment rights (I.A. 24a). All parties appealed—plaintiffs from the adverse decision on constitutionality, defendants and intervenors from the ruling of a statutory violation.

Intervenors' notice of appeal was not limited to the question whether the individuals suing their unions with employer funds were "union-member employees," but covered the entire spectrum of issues in the case and substantially duplicated the issues being raised by the defendant Right to Work groups which are financing the intervention. Plaintiffs moved to dismiss the appeal of the intervenors as outside the scope of the intervention permitted them by the District Court. On September 26, 1977 the Court of Appeals granted the motion to dismiss except as to matters stated on page five of intervenors' notice of appeal ("union-member employees" matters) which, the Court below said in its order, "will be the sole matters to be briefed in this appeal . . ." (I.A. 4a) by intervenors.

Despite this crystal clear limitation on the contents of intervenors' brief, instead of discussing the question they were permitted to brief, intervenors filed a 51-page brief dealing with every possible issue in the case other than the one the Court below had permitted them to address. On November 22, 1977 plaintiffs moved to strike intervenors' brief as a violation of the Court's direction to limit same to the union-member employees question. On December 21, 1977 the Court of Appeals granted the motion to strike and directed counsel for intervenors to "correct the brief, within ten days from the date of this order, to comply with the order filed herein on September 26, 1977" (I.A. 3a). On December 30, 1977 intervenors filed a motion for rehearing, stay and clarification repeating all the same arguments intervenors had earlier made against the motions to dismiss their appeal and to strike their brief. On January 23, 1978 the Court of Appeals denied the motion for rehearing, stay and clarification, adding the warning that "[t]he Court will not entertain an application for stay of mandate or other dilatory pleading" and directing counsel "to comply with the order of this Court, whatever other pleadings counsel may file" (I.A. 2a).

There is thus no genuine issue presented for this Court's review. For the petition for certiorari to review the action of the Court of Appeals in limiting intervenors' brief to the issue covered by the original District Court intervention order (summarily affirmed by the Court of Appeals with certiorari denied by this Court) only compounds the previous impositions on the time of this Court by the intervenors and the Right to Work groups financing their intervention efforts (see n. 2, *supra*).

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED AS FRIVOLOUS[7]

Intervenors would bring to this Court a purported right to file a brief on the merits in the Court of Appeals, although the District Court found that the intervenors "are adequately represented" (I.A. 51a) by defendant Right to Work groups and this finding has been summarily affirmed by the Court of Appeals with certiorari denied by this Court. This finding is not subject to question. Intervenors seek to argue their alleged right to maintain their suits against labor unions with the assistance of defendant Right to Work groups, which are financed by interested employers. Since the defendants are fighting for precisely that same right in this litigation, it is inconceivable that they would not be providing intervenors fully adequate representation of intervenors' interests—if only to protect their own identical interests. After all, the right to support intervenors' suits with funds of interested employers and the right of intervenors to be so supported are but two sides of the same coin. And every judge before whom this proposition has come has so held. Defendant Right to Work groups are represented in the Court of Appeals by multiple responsible counsel, headed by Whitney North Seymour, and intervenors' imposition on the time of this Court to consider once more their right to file a duplicating brief is quite unlawyerlike.

Nor is there any credible alternative argument for an all-encompassing brief by intervenors in the Court of Appeals predicated on the District Court's granting of

[7] Intervenors (Pet. p. 4) rely for jurisdiction of this Court upon the all-writs clause, 28 U.S.C. § 1651(a), and the certiorari statute, 28 U.S.C. § 1254(1). Although it is unlikely that either statute gives this Court jurisdiction to review the action of a Court of Appeals in rejecting a brief filed with it, it seems wholly unnecessary to burden this Court with a lengthy discussion of these statutes since the Court of Appeals was obviously correct and the attack upon its action is wholly frivolous.

limited permissive intervention. The Court only afforded intervenors "an opportunity to submit evidence on the limited issue" of whether the individual intervenors bringing the lawsuits "were at the time of those actions union-member employees, and to submit briefs on the legal question extant. . . ." (I.A. 51a-52a).[8] When the intervenors went beyond the "union-member employees" question in filing their answer, the District Court promptly struck it as "outside the scope of the permissive intervention granted" (App. 5a). Appealing from these two actions of the District Court, intervenors told the Court of Appeals that the intervention granted was "meaningless and feckless" (No. 76-1346, Br. p. 25) and assigned intervenors "an insignificant cameo role, more limited than even that of an amicus curiae" (No. 76-1530, Br. p. 21). And petitioning for certiorari from the Court of Appeals summary affirmance, intervenors argued to this Court that the permissive intervention was "disabling", "feckless", and "manque" and that it denied them "the ability to defend effectively their interests and rights by censoring the substantive matters they may prove or upon which they may submit legal briefs (Pet. for Cert., pp. 14-15; Reply Brief, p. 2, No. 76-1289, October Term 1976). Having tried and failed to persuade the Court of Appeals and this Court that the District Court illegally restricted their rights, intervenors are now back here saying the exact opposite—that they were *not* so restricted by the limited permissive intervention. Having sought review of the intervention order on the

[8] Intervenors misquote the District Court's March 8, 1976 order when they contend (Pet. pp. 14-15) that it "explicitly gave the right to submit 'briefs on the legal questions extant.'" The order (I.A. 51a-52a) gives the right "to submit briefs on the legal question extant." At any rate, it would make no difference if the order had read "legal questions" instead of "legal question" because the context and the interpretation by both Courts below made clear intervenors were in all respects to be limited to the "union-member employees" question.

ground that it unduly restricted their intervention and having lost therein in the District Court, the Court of Appeals and this Court, intervenors' present about-face is simply an abuse of judicial process. This Court could properly add its censure of that abuse to its action on the petition.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari be denied.

Respectfully submitted,

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